

Supplemental Final Statement of Reasons to address issues raised in OAL's February 8, 2012 Disapproval Memo

F. CHANGES TO THE TEXT OF REGULATION

Changes made to the regulation consist of the following sections (with ~~strike out~~ for deletions and underline for additions):

(Sections 597.1(c), (g) and (h) were modified with the insertion of "water code" before the section number for clarification. Section 591.1(i) was deleted due to public comment and disapproval from OAL.)

- c) A water supplier providing water to wildlife refuges or habitat lands where (1) the refuges or habitat lands are under a contractual relationship with the water supplier, and (2) the water supplier meets the irrigated acreage criteria of Water Code §10608.12(a), is subject to this article.
- g) Pursuant to Water code §10608.8(d), an agricultural water supplier "that is a party to the Quantification Settlement Agreement, as defined in subdivision (a) of Section 1 of Chapter 617 of the Statutes of 2002, during the period within which the Quantification Settlement Agreement remains in effect," is not subject to this article.
- h) Pursuant to Water Code §10608.12(a), the Department is not subject to this article.
- ~~i) An agricultural water supplier subject to Central Valley Project Improvement Act (CVPIA) (Public Law 102-575) or the Reclamation Reform Act (RRA) of 1982 shall be deemed in compliance with this article if all irrigation water delivered by that water supplier to each customer is delivered through measurement devices that meet the United States Bureau of Reclamation accuracy standards defined in Reclamation's Conservation and Efficiency Criteria Standards of 2008.~~

(Sections 597.3(b)(1)(A) has been modified to delete redundant language. The phrase "downstream of the point of measurement" has been deleted as it is redundant to similar language appearing in paragraph 597.3(b)(1).) Section 597.3(b)(1)(B) has been modified in response to comments received from stakeholders and OAL to address comments regarding ambiguity of the cost effectiveness and in response to comments received from stakeholders and the California Water Commission decision on April 18, 2012 and on May 8, 2012.

- b) **Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers**

1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers ~~downstream of the point of measurement~~ needed to install, measure, maintain, operate, and monitor a measurement device.

Or,

B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of ~~When the measurement options in §597.3(a) cannot be met, as approved determined by an engineer, by installing a measurement device or devices commercially available (manufactured or on site built or in-house built measurement devices) with or without additional components (such as gauging rod, water level control structure at the farm-gate, etc), that is comparable in cost to other measurement devices commonly in use, at each of the downstream individual customer's delivery points because small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at those delivery points exceed the device accuracy standard. When a water measurement device becomes commercially available, that is comparable in cost to other measurement devices commonly in use, and When~~ If conditions at the delivery points change such that can meet the accuracy standards of measurement options in §597.3(a)(2) at the individual customer's delivery points farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, as specified in §597.4, a schedule, budget and finance finance plan to measure water at the individual customer delivery points in compliance with §597.3(a)(2) of this Article. Agricultural water supplier shall report in its Agricultural Water Management Plan schedule, budget, and plan and demonstrate progress over time to measure water at all the farm-gates using a commercially available or on-site built measurement device consistent in compliance with §597.3(a)(2) of this Article.

(Section 597.3(b)(2) has been modified to add the word 'current' to ensure that up-to-date documentation gets submitted in the Agricultural Water Management Plans.)

2) An agricultural water supplier choosing an option under paragraph (b)(1) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:

(Section 597.3(b)(2)(A) has been modified to require suppliers claiming the lack of access to customers delivery points to make a certification through their legal counsel.)

A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall ~~self~~-certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those ~~customer delivery~~ points.

(Section 597.3(b)(2)(B) has been modified to require documentation of device unavailability and water level conditions to be consistent with the reasons described in section 597.3(b)(1)(B).)

B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the field water level or flow conditions described in §597.3(b)(1)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.

(The title for Section 597.4(b) was modified with "of Existing Devices" for clarification.)

b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

G. Summary and Responses from the noticed 45-day public comment period (July 22, 2011 through September 6, 2011, first 15-day public comment period (September 23, 2011 to October 7, 2011), second 15-day public comment period (October 20, 2011 to November 3, 2011))

G0: (8/8/2011 Public Hearing) Because Section 531 of the Water Code requires reporting of aggregated farm gate deliveries, I would like DWR to consider accepting an average accuracy of all devices across the turnouts of a district instead of requiring every single device to meet the accuracy requirement as proposed in this regulation.

Department Response: Reject. See responses to G 9, G10 and G21.

G14: The Department has not provided a rationale why section 597.3(b)(1)(B) is limited to a single measurement device, particularly when two devices may effectively and accurately measure water deliveries at the farm gate. The obvious, albeit unstated, reason for this exception is the cost of requiring more than one measurement device. However, as we have previously noted, two provisions of SB 7X 7 conclusively demonstrate that a "locally cost effective" exemption does not apply to the measurement requirement. First, the Act includes explicit cost effectiveness exemptions for other efficiency practices in section 10608.48(c), but not with respect to water measurement and volumetric pricing requirements in section 10608.48(b).

In response to OAL decision of February 2, 2012 Department Response is updated. See "Department updated Responses G57, G58, and G59"

G15: Section 597.1 of the draft regulation would provide that certain CVP and RRA contractors “are deemed in compliance” with the requirements of SB 7X 7, and thus exempts such contractors from having to comply with the measurement requirement of Section 10608.48(b). However, all Agricultural Water Suppliers subject to SB 7X 7, including CVP contractors, must meet the measurement requirement of Section 10608.48, and the proposed exemption is unlawful. SB 7X 7 specifically excludes certain CVP contractors from having to prepare and submit Agricultural Management Plans, permitting certain CVP contractors to instead submit the water conservation plan that has been accepted as adequate by the U.S. Bureau of Reclamation (Reclamation).

Department Response: Accept in part - The Regulation did not exempt the CVP and RRA contractors. However, Water Code section 10608.48(b)(1)(i) limits the DWR’s regulatory authority to the following:

“[P]roviding a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement in [section 10608.48(b)(1)].”

Water Code section 10608.48(b)(1) requires agricultural water suppliers to measure the volume of water delivered to customers with sufficient accuracy to comply with section 531.10 and nothing more. *See Barton v. Napa Co. Bd. of Supervisors* (1991) 226 Cal.App.3d 1467, 1480. The statute’s clear and unambiguous regulatory authority to the Department to provide a range of water measurement requirement options does not extend to interpreting section 10828, the so-called CVP water supplier statutory exemption. That section describes a possible exemption for certain federal water suppliers from state water plan requirements and falls outside of section 10608.48’s regulatory charge to the Department. Affected water suppliers may interpret that provision’s language as they see fit.

The U.S. Constitution’s Supremacy Clause in Art. IV, could also affect whether the Department can interpret the CVP provision. A state regulation that conflicts with a federal statute, making compliance with the state law in effect impossible, would be pre-empted by the federal statute and a barrier to implementing the state regulation. *See Louisiana Public Service Comm’n v. F.C.C.* (1986) 476 US 355, 366.

Though the CVP provision’s language is ambiguous, DWR agrees that the exemption for CVP contractors seems to apply to the planning and reporting requirements and not from the water measurement requirements.

In response to OAL decision of February 2, 2012 Department Response is updated. See “Department updated Response G47”

G16: The proposed accuracy standard should be revised downward from 12% to 10% so not to conflict with the statutory requirement that suppliers “Measure the volume of water delivered to customers with sufficient accuracy.”

Department Response: Reject - Accuracy Standards in paragraph (1) of Section 597.3(a) are for existing devices installed in the field. The standard (12%) is slightly higher than that of new devices (10%) so that suppliers who already have measurement devices installed prior to the effective date of this regulation will not need to immediately replace those devices that are already meeting the slightly lower standard of 12% that is also deemed acceptable and meeting the statutory requirement of 'sufficient accuracy'. Furthermore, given the life cycle of measurement devices, existing devices will eventually need to be replaced and meet the 10% accuracy standard.

In response to OAL decision of February 2, 2012 Department Response is updated.

Updated Department Response: Section 597.4(b) title was modified in later drafts as "Protocols for Field-Testing and Field-Inspection and Analysis of existing Devices". The $\pm 12\%$ by volume accuracy pertains only to existing devices. As devices are replaced, the required accuracy will be $\pm 5\%$ by volume for laboratory certified devices, or $\pm 10\%$ by volume for in-field, non-laboratory certified devices.

G20: The Department of Water Resources must obtain the concurrence of the Department of Finance in its findings and conclusions contained in STD 399.

Department Response: Reject - Finance approval and signature is only required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399. As noted in the responses to G18. and G19., DWR believes that costs are eventually passed to the rate payers, and as a result, SAM sections 6601-6616 does not apply and the 'Fiscal Impact Statement' section of Form 399 did not need to be completed. Furthermore, DOF review interest is when there is cost incurred by the State.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED SECOND 15-DAY PUBLIC COMMENT PERIOD (OCTOBER 20 THROUGH NOVEMBER 3, 2011)

G46: The Department and Commission lack statutory authority to approve section 597.1(i) as part of the regulation. Although the statute exempts certain contractors of the Bureau of Reclamation from having to submit agricultural water management plans to report compliance, see Water Code §§ 10608.48(f), 10828, there is no similar exemption from the requirements for all agricultural water suppliers to measure the volume of water delivered to customers and implement volumetric pricing, see Water Code § 10608.48(b). The statute requires all agricultural water suppliers to implement these two critical water management practices, and the statute provides no exemptions from these requirements, whether based on cost-effectiveness, or for Bureau of Reclamation contractors. Water Code § 10608.48(b). However, Section 597.1(i) effectively exempts certain contractors of the U.S. Bureau of Reclamation from the requirements of the regulation, including the requirement to verify the accuracy of measurement devices. In response to prior comments, the Department had removed this provision from the draft regulation, essentially conceding that it lacked statutory authority for this provision and that the provision violated the requirements of SB 7x7. In the Final Statement of Reasons distributed at

the October 19, 2011 meeting of the California Water Commission, the Department acknowledged in responses to comments that:

- "... DWR agrees that the exemption for CVP contractors seems to apply to the planning and reporting requirements and not from the water measurement requirements." (page 12) (emphasis added)
- "... including the CVP provision in the regulation (the deleted previous section 597.1 (i)) would, in the Department's view, improperly alter and enlarge the statute's scope, and it would extend the Department's statutory authority beyond what section 10608.48(i)(1) allows." (page 17) (emphasis added)

The Department's responses to comments in the Final Statement of Reasons makes clear that the Department has concluded that it lacks statutory authority for this provision. The Department has previously explained that this provision is unlawful, as we noted in our prior comments. We strongly agree that section 597.1(i) is unlawful and should be removed from the regulation.

Department Response: Reject- The California Water Commission (CWC) considered all arguments and voted to reinsert the CVP provision indicating that section 597.1(i) of the regulation is a minimum requirement for federal water suppliers. The Reclamation's 2011 criteria are not effective until January 2012, so the CWC may be required to modify the regulation at that time since the 2011 criteria requirements will supersede the 2008 criteria requirements.

Updated Department Response: Accept – 597.1(i) was deleted, including the 2008 reference, in future 15-day Notices due to public comments.

G47: Section 597.1(i) would unlawfully exempt some Bureau of Reclamation contractors from verifying the accuracy of measurement devices, without valid justification.

Department Response: Reject – The Bureau of Reclamation's 2011 Criteria require documentation verifying the accuracy standards of the measurement devices used. Given the fact that the 2011 Criteria will not be in effect until January 2012, the Commission decided to move forward with the agricultural water measurement regulation referencing the 2008 Bureau criteria. Once the new criteria are in place, DWR will have to amend its regulation to incorporate the 2011 criteria.

Updated Department Response: Accept – 597.1(i) was deleted, including the 2008 reference, in future 15-day Notices due to public comments.

G48: Because the scope of the exemption provided in Section 597.1(i) is unclear, the provision fails the Clarity Standard of the APA.

Department Response: Reject – See response to G46, above.

Updated Department Response: Accept – See updated responses to G46-G47.

I. DETERMINATIONS

I.9 Alternative Determination:

DWR considered three alternative frameworks for developing a range of options for measuring agricultural water deliveries: (1) develop a regulation that includes a list of acceptable measurement devices maintained in defined manners to achieve desired accuracy; (2) develop a regulation setting a performance standard that defines minimum benchmarks for device accuracy that could be met or bettered by a range of devices; or (3) develop a regulation that provides a process for suppliers to assess and report their own locally-determined standards for measurement accuracy.

This regulation is based on alternative (2), which specifies a performance standard that defines minimum device accuracy benchmarks. This alternative provided the most appropriate framework and flexibility to establish a range of measurement options. A performance standard meets the intent of the legislation in the most flexible and cost-effective manner. No specific technology is required and no specific device is required. The only requirement is to use a device that meets an acceptable minimum accuracy standard.

Pursuant to Administrative Procedures Act Government Code 11346.5 (a) (13), the Department has determined for the reasons discussed above in this Final Statement of Reasons and in the summary and response to comments to the initial 45-day comment period and two subsequent 15-day notices that no alternatives considered would be more effective in carrying out the purposes for which the Agricultural Water Measurement proposed or would be as effective and less burdensome to affected private persons than the adopted Agricultural Water Measurement.